

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

SEAN RODNEY ORTH,

Plaintiff,

vs.

PHILLIP DUFFY, *et al.*,

Defendants.

Case No.: 2:21-cv-01988-GMN-VCF

**ORDER ADOPTING IN PART AND  
REJECTING IN PART R&R**

Pending before the Court is Plaintiff Sean Rodney Orth's ("Plaintiff's") Objection, (ECF No. 40), to the Magistrate Judge's Report and Recommendation ("R&R"), (ECF No. 39), recommending that certain claims be dismissed. Defendants Phillip Duffy, *et al.* (collectively, "Defendants") filed a Response, (ECF No. 42).<sup>1</sup>

Also pending before the Court is Defendants' Motion to Extend Time, (ECF No. 41).

For the reasons discussed below, the Court **GRANTS in part** and **DENIES in part** Plaintiff's Objection, **GRANTS** Defendants' Motion to Extend Time,<sup>2</sup> and **ADOPTS in part** and **REJECTS in part** the Magistrate Judge's R&R.

**I. BACKGROUND**

This case arises out of the police officer Defendants' allegedly unlawful search and seizure of Plaintiff and the Nevada Department of Corrections Defendants' alleged deliberative indifference to Plaintiff's medical needs. (*See generally* Second Am. Compl. ("SAC"), ECF

<sup>1</sup> Plaintiff also filed a Reply, (ECF No. 45), without leave from the Court. Under this Court's local rules concerning objections to magistrate judge orders, "Replies will be allowed only with leave of the court." LR IB 3-1(a). Accordingly, the Court STRIKES Plaintiff's reply. Moreover, even if the Court did not strike the Reply, nothing in it alters the Court's decision.

<sup>2</sup> Plaintiff did not respond to Defendants' Motion to Extend Time. "The failure of an opposing party to file points and authorities in response to any motion, except a motion under Fed. R. Civ. P. 56 or a motion for attorney's fees, constitutes a consent to the granting of the motion." D. Nev. LR 7-2(d). Accordingly, the Court GRANTS the Motion to Extend Time as unopposed, *nunc pro tunc*.

1 No.38).<sup>3</sup> The Magistrate Judge has twice now screened Plaintiff's complaint. (*See* R&Rs, ECF  
2 Nos. 30, 39). In the R&R presently before the Court, the Magistrate Judge ordered that  
3 Plaintiff's Second Amended Complaint ("SAC") may proceed on his Excessive Force and  
4 Assault and Battery claims only, and recommended dismissal of Plaintiff's claims for False  
5 Imprisonment, Intentional Infliction of Emotional Distress, and Cruel and Unusual Punishment.  
6 Plaintiff objects to this recommendation. (Obj., ECF No. 40).

## 7 **II. LEGAL STANDARD**

8 A party may file specific written objections to the findings and recommendations of a  
9 United States Magistrate Judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);  
10 D. Nev. L.R. IB 3-2. Upon the filing of such objections, the Court must make a *de novo*  
11 determination of those portions to which objections are made. D. Nev. R. IB 3-2(b).

12 Because Plaintiff is incarcerated, the Magistrate Judge screened the SAC under 28  
13 U.S.C. § 1915A. During the screening process, courts dismiss any claims that are "frivolous,  
14 malicious, or fail[] to state a claim upon which relief may be granted." 28 U.S.C.  
15 § 1915A(b)(1). Courts apply the Federal Rule of Civil Procedure 12(b)(6) standard when  
16 determining whether a complaint states a claim upon which relief can be granted. Under the  
17 Rule 12(b)(6) standard, a pleading must give fair notice of a legally cognizable claim and the  
18 grounds on which it rests, and although a court must take all factual allegations as true, legal  
19 conclusions couched as factual allegations are insufficient. *Bell Atl. Corp. v. Twombly*, 550  
20 U.S. 544, 555 (2007). Accordingly, Rule 12(b)(6) requires "more than labels and conclusions,  
21 and a formulaic recitation of the elements of a cause of action will not do." *Id.*

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25 <sup>3</sup> The Court incorporates the background information of Plaintiff's claims from its previous Orders, (ECF Nos. 19, 36).

### 1 **III. DISCUSSION**

2 The Magistrate Judge recommends dismissing Plaintiff's claims for (1) Intentional  
3 Infliction of Emotional Distress, (2) Cruel and Unusual Punishment, and (3) False  
4 Imprisonment. The Court addresses each claim in turn.

#### 5 **A. Intentional Infliction of Emotional Distress**

6 To establish a cause of action for intentional infliction of emotional distress (IIED), the  
7 plaintiff must establish the following: "(1) extreme and outrageous conduct with either the  
8 intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having  
9 suffered severe or extreme emotional distress, and (3) actual or proximate causation." *Star v.*  
10 *Rabello*, 625 P.2d 90, 92 (Nev. 1981). "[E]xtreme and outrageous conduct is that which is  
11 'outside all possible bounds of decency' and is regarded as 'utterly intolerable in a civilized  
12 community.'" *Maduike v. Agency Rent-A-Car*, 953 P.2d 24, 26 (Nev. 1998) (quoting Cal. Book  
13 of Approved Jury Instructions No. 12.74).

14 The Magistrate Judge recommends dismissing Plaintiff's claim for IIED because he  
15 "does not allege that he suffered emotional injuries other than to mention IIED. For example,  
16 he does not allege whether he suffered extreme humiliation, mental anguish and physical and  
17 mental distress as a proximate cause." (R&R 5:9–11). In his Objection, Plaintiff simply quotes  
18 his SAC, which alleges that "Plaintiff fears and has extreme anxiety over quality of life in the  
19 future, loss of employment options and retaliation for filing this lawsuit." (Obj. 4:10–13,) (quoting SAC ¶ 6, ECF No. 38). Additionally, Plaintiff asserts that his SAC alleges that his  
20 "anxiety and fear is not just related to the pain and injury but to the adverse effect on Plaintiff's  
21 future employment options that will require disclosure of the injury and/or disability related to  
22 it." (*Id.* 5:9–12) (quoting SAC ¶ 36). Although, as Plaintiff highlights, his SAC did contain  
23 references to emotional injuries, the Court agrees with the Magistrate Judge that Plaintiff's  
24 conclusory allegations do not give fair notice under Rule 8 and should be dismissed. Mere  
25

1 recitation of emotional injuries without alleging proximate causation or extreme and outrageous  
2 conduct is insufficient to state a claim under Rule 12(b)(6). *See Twombly*, 550 U.S. at 555. The  
3 Court ADOPTS the R&R to DISMISS Plaintiff's IIED claim.

#### 4 **B. Cruel and Unusual Punishment**

5 The Eighth Amendment prohibits cruel and unusual punishments. U.S. Const. amend.  
6 VIII. A prisoner suffers cruel and unusual punishment when prison officials act with deliberate  
7 indifference to the prisoner's serious medical need. *See, e.g., Edmo v. Corizon, Inc.*, 935 F.3d  
8 757, 766 (9th Cir. 2019) (per curiam). For a prison official to act with deliberate indifference  
9 to a serious medical need, the prison official must knowingly disregard an excessive risk to a  
10 prisoner's health. *Peralta v. Dillard*, 744 F.3d 1076, 1082 (9th Cir. 2014) (en banc). This  
11 requires a plaintiff to show "that the course of treatment the [defendants] chose was medically  
12 unacceptable under the circumstances and that the defendants chose this course in conscious  
13 disregard of an excessive risk to the plaintiff's health." *Hamby v. Hammond*, 821 F.3d 1085,  
14 1092 (9th Cir. 2016) (internal quotation marks omitted) (quoting *Snow v. McDaniel*, 681 F.3d  
15 978, 988 (9th Cir. 2012), *overruled by Peralta*, 744 F.3d 1076).

16 Only claims arising "after conviction and sentence" are subject to Eighth Amendment  
17 scrutiny. *Lee v. City of L.A.*, 250 F.3d 668, 686 (9th Cir. 2001) (quoting *Graham v. Connor*,  
18 490 U.S. 386, 393 & n.6 (1989)). Claims arising before or during a warrantless arrest must be  
19 analyzed under the Fourth Amendment's "objective reasonableness" standards. *Graham*, 490 at  
20 388.

21 To the extent Plaintiff alleges his arrest constituted cruel and unusual punishment, the  
22 Court ADOPTS the R&R and DISMISSES such claim with prejudice because the Eighth  
23 Amendment does not apply until after there has been an adjudication of guilt. *Bell v. Wolfish*,  
24 441 U.S. 520, 535 (1979). But the Magistrate Judge also recommends dismissing Plaintiff's  
25 claims for cruel and unusual punishment arising from the prison official Defendants' alleged

1 deliberate indifference to Plaintiff's hand and elbow injuries ostensibly sustained while he was  
2 incarcerated. (R&R 6:11–18). The Court REJECTS the R&R regarding this claim.

3 The SAC alleges that “Plaintiff was not prescribed pain medicine, splint, wrap, ice or  
4 anything by Defendant Doctor Bernales and never saw him or medical staff to attend to the  
5 [hand and elbow injuries] any time soon.” (SAC ¶ 27). Even though “plaintiff does not specify  
6 how he received these injuries,” (R&R 6:16–17), the underlying cause of a medical need is not  
7 an element of an Eighth Amendment claim for deliberate indifference. The Court finds that  
8 Plaintiff sufficiently alleged that (1) he had a serious medical need in the form of a shattered  
9 hand; and (2) Defendants were deliberately indifferent to his injuries by failing to provide  
10 adequate medical care after Plaintiff informed them of his injuries. *See Wilhelm v. Rotman*, 680  
11 F.3d 1113, 1122 (9th Cir. 2012) (explaining two-prong test for deliberate indifference to  
12 medical need).

13 The Magistrate Judge correctly notes, however, that Plaintiff's hand and elbow injuries  
14 “occurred a year after his arrest and appear to be unrelated to any injuries he may have suffered  
15 during his arrest.” (R&R 6:12–13). The Magistrate Judge further contends that Plaintiff may  
16 not be precluded from filing a new complaint. The Court agrees with the Magistrate Judge that  
17 these injuries should have been filed as a separate lawsuit against the NDOC Defendants.  
18 Nonetheless, in light of Plaintiff's status as a pro se litigant and to avoid his claims being time-  
19 barred as the end of the statutory period of limitations draws near, the Court will permit  
20 Plaintiff's inartful pleading to proceed at this stage. After all, Plaintiff has alleged all the  
21 elements for a deliberate indifference claim. Accordingly, Plaintiff's claim for cruel and  
22 unusual punishment arising from Defendants' alleged deliberate indifference to his hand and  
23 elbow injuries while he was incarcerated may proceed, and the Court REJECTS the R&R to the  
24 extent it recommends otherwise.

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1       **C. False Imprisonment**

2           Plaintiff's claim for false imprisonment challenges High Desert State Prison's authority  
3 to confine Plaintiff. (SAC ¶¶ 14–26). Any claim by a prisoner attacking the fact or duration of  
4 his custody pursuant to a criminal conviction or sentence must be brought by way of a petition  
5 for a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Accordingly, the  
6 Court ADOPTS the R&R and DISMISSES this claim with prejudice.

7       **D. Leave to Amend**

8           The Court dismissed Plaintiff's False Imprisonment claim and Eighth Amendment claim  
9 arising from his arrest with prejudice and without leave to amend because amendment would be  
10 futile. The Court also declines to grant leave to amend Plaintiff's IIED claim. Plaintiff has had  
11 numerous opportunities to amend his complaint, and the Magistrate Judge has now screened the  
12 complaint multiple times. (*See* R&R 1:18–2:8). Permitting Plaintiff to amend his complaint yet  
13 again would cause undue delay and prejudice to Defendants. Accordingly, Plaintiff does not  
14 have leave to amend the claims dismissed in this order. *See Foman v. Davis*, 371 U.S. 178, 182  
15 (1962).

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1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that the Report and Recommendation, (ECF No. 39), is  
3 **ADOPTED in part and REJECTED in part.**

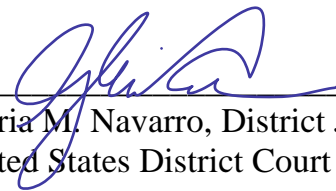
4 **IT IS FURTHER ORDERED** that the Objection to the Magistrate Judge's R&R, (ECF  
5 No. 40), is **GRANTED in part and DENIED in part.**

6 The following claims may proceed: (1) Excessive Force; (2) Assault; (3) Battery; and  
7 (4) Cruel and Unusual Punishment arising from Defendants' alleged indifference to Plaintiff's  
8 hand and elbow injuries while incarcerated.

9 The following claims are **DISMISSED without leave to amend**: (1) Intentional  
10 Infliction of Emotional Distress; (2) Cruel and Unusual Punishment arising from Plaintiff's  
11 arrest; and (3) False Imprisonment.

12 **IT IS FURTHER ORDERED** that the Motion to Extend Time, (ECF No. 41), is  
13 **GRANTED.**

14 Dated this 2 day of November, 2023.

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18 Gloria M. Navarro, District Judge  
19 United States District Court  
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